

The relationship between the executive and the judiciary in a democratic society;
the question is - who should be master?

The independence of the judiciary and the balance of power between the three powers of a democratic state: the legislature, the executive and the judiciary, are core elements of the work of the First Study Commission.

The central role of the legislature will not be part of our considerations of this year. In the past the First Study Commission has studied several topics where the relationship between the executive and the judiciary has been an element of the analysis. This year this relationship will be the centre of our investigation.

An examination from this viewpoint may make possible general conclusions on the mutual influence of these two branches of the powers of state and we hope will throw light on the question of the balance of powers in Member States and this specific aspect of independence of the judiciary.

For the purpose of this questionnaire we ask everyone

- (i) to exclude from their consideration the position of the “constitutional court” (if one is part of the judicial system in their country) can be regarded as part of the judiciary system; and
- (ii) to exclude the head of state in their country (as opposed to the head of government) from consideration as a part of the executive, unless the head of the state exercises power or “influence”. If either might be exercised, then it should be noted.
- (iii) “Influence” may be exercised or not; we think that if it might be exercised, then it should be noted.

PLEASE NOTE: These answers of the UK are based primarily on the position in England and Wales. There are different arrangements for both Scotland and Northern Ireland. However, the principles remain the same for all three areas.

Question 1: Is the principle of independence of the judiciary enshrined in the constitution or a comparable legal source in your country?

It is enshrined in the Act of Settlement 1702 and also the Constitutional Reform Act 2003. It is also a very firmly entrenched principle of the common law dating from the early 17th century.

Question 2: Is the principle of balance of powers enshrined in the constitution or a comparable legal source in your country?

No.

Question 3:

Is there any influence of the executive on selection and the first appointment of judges?

Yes, but since the Constitutional Reform Act 2003, it is very limited. The executive plays a part in the selection of the Judicial Appointments Commission, which is responsible for the appointment of all judges, but the JAC is, by statute, an independent body.

If yes: describe it.

Question 4:

Is there any influence of the executive on the promotion of judges?

Yes. High Court judges are appointed by the Crown on the advice of the Lord Chancellor. Judges of the Court of Appeal and the House of Lords (soon to be the

Supreme Court) are appointed by the Crown on the advice of the Prime Minister. In practice now their advice is formal, because the recommendations for appointment are made by the Judicial Appointments Commission, which is an independent body.

If yes describe it.

Question 5:

Is there any influence of the executive on the selection, or appointment or dismissal of presidents of court?

Yes. See the answer to Qu. 4 above. However, in the UK there are not many “Presidents of Courts” as one might find them in other countries. There are “Heads of Division”, who are very senior judges. Otherwise there are not really “Presidents of Courts” in the same way, although Crown Courts do have a “Resident Judge” who is the judge – administrator of that Crown Court and for civil courts there are “Designated Civil Judges”. The executive has no power in the appointment of judges to such posts.

If yes: describe it.

Question 6:

Is there any influence of the executive on the distribution of cases /assignment of judges to certain cases?

No. This is all done by the judges and the Listing Officers who are under the control of the judges.

If yes: describe it:

Question 7:

Is there any influence of the executive on the transfer of judges to other courts

Generally speaking there is no executive control over this. The only executive control is in relation to the promotion of judges where the system is as described in Qu. 4 and 5 above.

If yes: describe it.

Question 8:

Is there any influence of the executive on the termination of office of judges?

In general there is not. A High Court Judge or Court of Appeal judge can only be removed from office upon a positive resolution of both Houses of Parliament being passed. This has never happened since this law was introduced in 1702. For other judges the Lord Chancellor can remove a judge for a disciplinary offence, but only after a special disciplinary process has been completed and the Lord Chief Justice concurs with the proposal to remove the judge from office. This is a very rare event – I am not sure it has ever been invoked.

If yes: describe it.

Question 9:

Is there any influence of the executive on the disciplinary procedure against judges?

Yes. See answer to Qu. 8 above.

If yes: describe it.

Question 10:

Is there any influence of the executive on the initial training of judges?

If yes: describe it. *Only indirectly. Judicial training is in the hands of the Judicial Studies Board, which is controlled by the judges themselves and a staff which is*

responsible to the judges. However, the executive funds this body and to that extent it can control what it does. But in the UK there is much less initial training of judges than in other countries, because there is no such thing as a “career” as a judge. All full time judges will have been lawyers in practice for some years (at least 10 years) before they can become judges.

Question 11:

Is there any influence of the executive on the in-service training of judges?

If yes: describe it. *Yes to the extent set out in Qu. 10 above.*

Question 12:

Is there any influence of the executive on the salaries of judges?

If yes: describe it. *Yes. The level of judicial salaries is recommended by the Senior Salaries Review Board, which is an independent body, although its chairman is appointed by the government of the day. The recommendations are published. The government has, in the recent past, always accepted the recommendations for judicial salaries, but it is not obliged to do so. The government can still have an influence by (a) the submissions it makes to the SSRB and (b) whether it accepts the recommendations in full or it decides to implement them in stages – as happened in 2006 and 2007.*

Question 13:

Is there any influence of the executive in deciding on (a) the overall budget of the judiciary; and/or (b) how the funds designated for the judiciary are to be spent?

If yes (in either (a) or (b)), describe it. *Yes. Effectively the executive has full control of the overall budget of the judiciary, which is a part of the budget of the Ministry of Justice, whose budget is decided by the Chancellor of the Exchequer and the Cabinet. To a limited extent, the judiciary have a role in how the budget is spent, because the judiciary is represented on the Board of the Court Service, which runs the courts. However, the judges are not in charge of the allocation of funds; effectively the executive is.*

Question 14:

Is there any influence of the executive on the selection and appointment of clerks of the court?

If yes: describe it: *Yes. The clerks of courts are appointed by the Court Service, but with one exception, clerks of courts do not have a judicial role to play. The exception is in the case of clerks to the Magistrates’ courts. Magistrates are non – lawyers who need a lawyer to advise them in dealing with the law of the many minor cases (criminal and family) in their courts. These clerks are usually solicitors and can be either full time or part time clerks to Magistrates’ Courts. They are appointed as clerks by the Judicial Appointments Commission.*

Question 15:

Is there any influence of the executive on the composition of the Council of the judiciary or a similar body (if such a body exists)?

If yes: describe it: *No. However, there is no equivalent body to the kind of Council of the Judiciary as is found in eg. France, the Netherlands or in Italy. There is a Judges’ Council (which is a body that represents all judges and its members are elected by judges)*

and there is the Judicial Executive Board, which consists of the most senior judges of England and Wales.

Question 16:

Is there any other influence of the executive on the work of the Council of the judiciary or a similar body (if such a body exists)? ***No – see answer to question 15.***

If yes: describe it:

Question 17:

What influences (if any) does the judiciary have on the executive power of central/local government? In particular, (a) does the judiciary have any power to control the exercise of executive power (by virtue of orders that the court can make on the application of parties to the court) and (b) what power (if any), does the court have to oversee the appointment of members of the executive? ***(a) The court has control over the exercise of executive power by virtue of the principles of administrative law, whereby executive actions can be subjected to judicial review in the courts. However, this is usually limited to executive acts at the lower end of the scale (eg. planning, housing, decisions by civil servants), although litigants have attempted to attack the legality of some high level decisions, eg. the decision to stop the investigation of arms sales to Saudi Arabia and the decision to go to war in Iraq. Those attempts have always failed on the basis that they are essentially political acts which cannot be challenged in the courts.***

Question 18:

What power does the judiciary have over other public bodies (eg the police, or other quasi – governmental powers) in your country? ***The judiciary has no control except through decisions made in court, eg. by challenges to police or other powers through the mechanism of “judicial review” – see answer to Qu. 17 above. Judges are also appointed to consider any challenges to elections of MPs. Every year two “Election Judges” are nominated by the Lord Chief Justice.***

Question 19:

Who fulfils the task of prosecution in your country?

The Crown Prosecution Service, which is independent of both the police and the judiciary.

Question 20:

Is there a common career of ***public*** prosecutors and judges?

No.

Question 21:

Can judges be appointed as public prosecutors and vice versa?

No.

Question 22:

Is there an influence of the executive on the appointment/promotion of public prosecutors?

Yes.

Question 23:

Is there a possible influence of the executive on the cases public prosecutors are in charge of?

It is possible but I am not aware of any.

Question 24:

Which problems (if any) do you see in the relationship between the executive and the judiciary in your country?

The issue of the budget for the judiciary. The judges are anxious to have more control over the budget, but the executive is very reluctant to consider this.

Question 25:

Are there concrete projects to change elements in the relations between the executive and the judiciary ? What would this change mean? *No.*

The members of the First Study Commission are asked to send their answers to this questionnaire to the General Secretariat as well as to the members of the presidency committee of the Study Commission not later as **July 5th 2008**

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